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# FACT SHEET

L-951

## Better Estate Planning

# TEXAS LAWS ON DESCENT AND DISTRIBUTION

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*Estate Planning attempts to create an equitable compromise between minimizing the amount of taxes due, distributing the property as desired to the designated heirs and assuring a financial source of security.*

*This fact sheet on Texas Laws on Descent and Distribution was prepared by Eugene M. McElyea, L.L.B., College of Business, Texas A&M University and consultant to the Texas Agricultural Extension Service program for this series of fact sheets on Estate Planning.*

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Texas, like every other state, has a written will for citizens who do not prepare their own. This document is embodied in the state's descent and distribution laws.<sup>1</sup> These laws determine who inherits a deceased person's property and the proportion when there is no written will. When the written will does not dispose of all of an individual's property, these laws are used to distribute that which remains.

Texas is only one of eight states which has adopted and presently retains the community property system of property ownership between husband and wife. Under this system community property is broadly defined as all property of a

husband and wife acquired during the marriage, except property which one spouse owned before marriage or acquired during the marriage by outright gift, as a gift under someone's will or by inheritance under the laws of descent and distribution. Separate property is not community property as defined above.<sup>2</sup>

Under the community system, each spouse is deemed to own outright an undivided one-half interest in the total community estate. Therefore, when one spouse in Texas makes a will, he is able to dispose of only his separate property and his undivided one-half of the community property which he and his spouse owned together during marriage.

While the distinctions drawn between separate and community property have been necessarily general, note that determinations of the exact nature of specific items often have to be decided in the courts. It is the court's duty to pass final judgment as to the exact status of the property when a case arises. For discussion purposes and to fully understand the laws of descent and distribution, it is essential that one generally classifies a married couple's property into one of two categories since community property is distributed in one proportion and separate property may pass to other heirs in differing proportions.

### Community Property

The inheritance rule of community property is quite simple. Everything (both real estate and personal property) passes to the heirs with no distinction as to the type of property.

When one spouse dies, the surviving spouse immediately becomes entitled to one-half of all

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<sup>1</sup>Texas Probate Code, Sec. 37 et. seq.

<sup>2</sup>Texas Const. art. 16, sec. 15.

property owned by the two during marriage. One-half of the community property has all along belonged outright to the surviving spouse. Only that portion comprising the other half owned by the deceased is available for distribution to heirs. If the deceased has no child, children or other descendants, but has a surviving spouse, all of the other half belonging to the deceased goes to the surviving spouse. If, however, there is a child, children or descendants, then the one-half portion goes to that child or is equally divided among the children. The portion going to a child or children who do not survive is divided among the surviving children except in those instances when a deceased child has children of his own in which case the "child's part" is shared among them equally.

While the rule for community property is relatively simple, the matter becomes more involved when discussing separate property of a deceased spouse or the estate of a single person.

#### **Separate Property of a Single Person**

The separate estate, including real estate and other property, of a single person, widow or widower with a child or children, or their descendants, passes as follows:

If the single person, widow or widower has no child or descendants, then the estate is divided equally between his or her surviving parents. If only one parent survives, that parent takes a one-half portion and the remaining half is distributed to the brothers and sisters of the deceased parent or their descendants. If there are no brothers, sisters or descendants who qualify, then the entire one-half would go to the sole surviving parent of the deceased single person giving that parent the entire estate. If no parents survive the single person and there are no brothers or sisters (aunts and uncles) or descendants of brothers and sisters (cousins) on either the paternal or maternal sides to share in their respective one-half portion of the estate, other more-distant, collateral kinfolks receive in relation to their kinship.

#### **Separate Property of a Married Person**

The separate property of a married person with no children or descendants passes according to the following formula.

- When the separate estate is personal property (not real estate) it all goes to the surviving spouse.

- When the separate estate is real property, it goes one-half to the surviving spouse; one-fourth

to the mother of the deceased, if living, and one-fourth to the father of the deceased, if living. If one parent of the deceased is not living, his one-fourth portion is divided among respective brothers and sisters or the descendants of those brothers and sisters. If there are none in that category, a surviving parent would get a one-half portion rather than a one-fourth portion. The surviving spouse would be entitled to all of the separate property in a deceased person's estate only when no parents, brothers, sisters or descendants of the brothers or sisters exist.

Separate property of a married person with children passes according to the following formula.

- When the separate estate is personal property (not real estate) it goes in portions of one-third to the surviving spouse and two-thirds to any child, children equally or descendants who take a portion or divide the portion that passed to their deceased ancestor.

- When the separate estate is real estate, the surviving spouse gets a life estate in an undivided one-third of the realty and the remainder following the death of the surviving spouse goes to any child, children or descendants as described in the above paragraph. The remaining two-thirds passes outright to the child or children equally or to their descendants.

In addition to setting out the manner in which an estate shall pass in the absence of a will, other provisions of the law are applicable in other circumstances. Some other aspects of the law of descent and distribution are important to consider. These deal with the rights of adopted children, and joint tenancy arrangements, as well as other matters affecting an individual's right to inherit.

An adopted child is regarded as the child of the parent or parents by adoption. This child and his descendants inherit from the adoptive parents. The adoptive parent may also inherit from the adopted child. While the natural parents of a child who has been adopted may not inherit from the child, the adopted child may inherit from his natural parents. In effect, Texas law makes it possible for an adopted child to inherit from both natural and adoptive parents.

In many non-community property states, property owned by a husband and wife is frequently held in "joint-tenancy." This arrangement is not, however, limited solely to husband and wife, but can exist between a parent and child and in other ways. Joint-tenancy, as commonly interpreted, grants the surviving joint-tenant title to all of the property held in such joint arrangement upon



death of the other joint-tenant. Texas has expressly abolished this arrangement except in very limited instances where the parties have agreed to this survivorship aspect prior to creation of the joint-holding situation. One should be warned, however, that the valid form of a survivorship agreement has not been clearly determined by the courts. Preferably it should be in writing. One thing is clear, however, in Texas one is not able to assume from observing the title to property being maintained in two or more persons that any right of survivorship automatically exists among them. Without the express agreement which the law requires, jointly held property passes under the general provisions of the law or by will.

Additional inheritance problems arise when the heirs are not of the whole blood. The rule provides that if part of the collateral relatives (i.e. kin other than those in the direct line of ascendancy or descendancy) are of the half-blood and part are of the whole blood, those of the half-blood take only half portions. If all of them are of the half-blood and none of the whole blood, then they take whole portions.

Another problem concerns the right of aliens and convicts to inherit. There is no obstacle to their rights to inherit, except in the situation where a beneficiary of a life insurance policy is in some manner guilty and convicted in the death of an insured, in which event an inheritance is denied. The property of one committing suicide passes as though it were a natural death.

The right of an after born or posthumous child to inherit is also provided for in the statute. By will such a child who is born or adopted after a will is written may be cut out of an inheritance

only if the surviving spouse who is a parent or lineal ancestor of such child is the primary beneficiary under the will. An inheritance of a child not yet born is not lost, but no one other than a child or lineal descendant who is not yet born is considered an heir.

The status of an illegitimate child is relatively certain. The right to inherit from his mother is unquestioned. Whether or not such a child may inherit from his father is not clear. The general rule is that there is no inheritance as a matter of right, but under certain circumstances (when the father shall later marry the child's mother) an inheritance might arise, but this would depend on the particular case.

From this review it can be understood that when one dies without a will, trouble will likely follow in settling an estate. The law, as written, can be changed easily by the provisions of one's will, but in the absence of a will, the court is bound to act in strict accordance with provisions of the law. Courts make every effort to be fair and equitable, but these provisions leave very little room for discretion. To avoid the undesirable result of the laws of descent and distribution, prepare a will.

*This publication is designed to provide accurate and authoritative educational information in regard to the subject matter covered.*

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## SUGGESTED READINGS

Listed below are additional Extension fact sheets on Estate Planning.

- L-950 The Importance of a Will in a Texas Estate**
- L-952 Community and Separate Property in Texas**
- L-953 Costs of an Estate in Probate**
- L-954 Charitable Gifts**
- L-955 Federal Estate and State Inheritance Taxes**
- L-956 Gifts and Trusts: Effective Estate Planning**